IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-7528
[2015] NZHC 2916

BETWEEN	PETER FERREIRA Plaintiff
AND	DANIELA STOCKINGER First Defendant
AND	AGAPE-HIGH HOLISTIC HORSEMANSHIP LIMITED Second Defendant

Hearing: 25 June 2015

Appearances: M Matthew for Plaintiff
No appearance for Defendants

Judgment: 20 November 2015

JUDGMENT OF DUFFY J

This judgment was delivered by me on 20 November 2015 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Solicitors:
Rennie Cox, Auckland

[1] The plaintiff brings claims against the first and second defendants in this Court's civil jurisdiction based on equitable estoppel, unconscionable conduct and conversion. The plaintiff also brings a claim under the Property (Relationships) Act 1976. The defendants have not filed statements of defence, nor have they taken steps to oppose the claims made against them. Accordingly, the claims have proceeded by way of formal proof.

[2] This dispute arises following the end of a de facto relationship between the plaintiff, Peter Ferreira, and the first defendant, Daniela Stockinger (now Mrs Galy).[1] They are German nationals who were independently wealthy at the material times.[2] During their relationship Mr Ferreira and Ms Stockinger spent substantial sums of money acquiring real and personal assets in foreign jurisdictions and in New Zealand. Some of those assets were acquired in the name of corporate entities. The parties spent substantial sums of money acquiring assets and financing an extravagant lifestyle, which included numerous overseas trips.

[3] The parties' de facto relationship commenced in January 2004 and ended in May 2005. It then re-commenced in June 2005 and ran until November 2006. For some of the time during the course of their relationship Mr Ferreira and Ms Stockinger were present in New Zealand.

[4] A de facto relationship that is otherwise subject to New Zealand law and which lasts for less than three years is categorised as a relationship of short duration under the Property (Relationships) Act 1976.[3] There is no impediment in such cases to the parties bringing claims in the civil jurisdiction of the New Zealand legal system.

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1 Ms Stockinger has since married and is now known as Mrs Galy, however I shall refer to her throughout this judgment as Ms Stockinger as that is the name by which she was known at the material times.

2 Each now seems to be in financially strained circumstances.

3 Property (Relationships) Act 1976, s 2E. Pursuant to s 14A of the Act, an order for the division of relationship property of a de facto relationship of short duration cannot be made under the Act unless either there is a child of the relationship or the applicant has made a substantial contribution to the relationship, and the court is satisfied that failure to make an application would result in serious injustice. If these requirements are met then the share of each partner in the relationship property is to be determined in accordance with the contribution of each partner to the de facto relationship.

[5] Mr Ferreira now claims that in terms of funds that he advanced either directly or indirectly to Ms Stockinger or to an entity associated with her he did so in reliance on representations she made that she would repay those sums some time in the future. Further that Ms Stockinger has failed to honour those representations. This has led him to make claims under the New Zealand law of equitable estoppel and/or "unconscionable conduct" and to seek an award of "equitable damages" in the total sum of $2,449,006.07 plus interest under s 87 of the Judicature Act 1908.

[6] Mr Ferreira also makes a claim under New Zealand law for the tort of conversion in relation to Ms Stockinger's actions in allegedly seizing his personal property. Here he seeks damages in the total sum of $324,819.03.

[7] Mr Ferreira seeks a declaration that $63,400 he transferred to BDO Spicer as a "stakeholder" is his property, thus enabling that sum of money to be paid to him.

[8] In addition to the claim currently before the Court, Mr Ferreira has previously commenced litigation against the first defendant in the Family Court and, through a company, sought summary judgment against the second defendant. In the present proceeding Mr Ferreira seeks "equitable damages in respect of the legal expenses that he incurred" in those proceedings. The amount claimed is $200,000. He also seeks solicitor-client costs in respect of the current claim.

[9] Finally, Mr Ferreira seeks orders under the Property (Relationships) Act 1976 declaring that he and Ms Stockinger were in a de facto relationship of short duration within the meaning of s 14A of the Property (Relationships) Act; and an order granting him leave under s 14A to bring a proceeding under that Act.

Jurisdiction

[10] At present neither Mr Ferreira nor Ms Stockinger reside in New Zealand. He resides in Switzerland and she resides in Austria. The second defendant is a New Zealand registered limited liability company (hereafter referred to as AHQ).

[11] Mr Ferreira made no submissions as to the parties' domicile. As German nationals the couple's original domicile would have been Germany. To acquire a

domicile in New Zealand they needed to meet the requirements of s 9 of the Domicile Act 1976.[4]

[12] Mr Ferreira's affidavit evidence reveals that he has never held the right to reside permanently in New Zealand, and while he was in the country he could remain here for no more than three months continuously. His application for residency in New Zealand was declined on 25 June 2007. In his affidavit he describes himself as living in exile in Switzerland. This is because he cannot reside indefinitely in New Zealand and he cannot return to his home country because he is the subject of a tax investigation there. Accordingly, I have difficulty seeing how he could be said to have acquired a New Zealand domicile in terms of the requirements of s 9 of the Domicile Act 1976.[5]

[13] In an affidavit dated 5 April 2013 Ms Stockinger says that she resides in Austria and has done so since December 2010.[6] She says nothing about whether she may have acquired a New Zealand domicile. However, the circumstances suggest to me that since moving to Austria it is unlikely that she has a New Zealand domicile.

[14] The parties' domicile can affect the extent to which Mr Ferreira is able to litigate a dispute in this country under its laws.

[15] Initially Mr Ferreira filed proceedings in the Family Court in November 2009.[7] By then he was residing outside New Zealand. It seems from the evidence that I have seen that Ms Stockinger was then still residing in New Zealand. If at that time Ms Stockinger was domiciled in New Zealand, s 7 of the Property (Relationships) Act would have applied the provisions of that Act to immoveable property situated within New Zealand and moveable property situated in New Zealand or elsewhere. But by the time Mr Ferreira filed proceedings in this Court he

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4 To acquire a new domicile in New Zealand at a particular time a person must be in New Zealand and intend to live here indefinitely.

5 Mr Ferreira commenced the present proceedings in 2012 which is approximately five years after he learned that he could not reside permanently in New Zealand.

6 Ms Stockinger took no part in defending this proceeding. However, Mr Ferreira relied upon the evidence that was filed in the Family Court proceeding, which includes the evidence of Ms Stockinger. On occasion he referred to her affidavit evidence as a source for the factual statements he made in his chronology of events. I consider therefore that in order to understand fully what occurred Ms Stockinger's evidence in the Family Court is available to me.

7 These proceedings are discussed in more detail below at [101].

and Ms Stockinger were both resident overseas. This country's immigration laws meant he could not live here indefinitely, and Ms Stockinger's change of residence to Austria suggests to me that she was no longer intending to live in New Zealand indefinitely.

[16] Whilst her correct address in Austria is pleaded in the initial statement of claim, and the current pleading, the front sheet gives Ms Stockinger's address as 98 Orere Point Road RD 5 Clevedon, Auckland which is in conflict with the address given in the body of both pleadings. On 19 December 2012 Associate Judge Bell directed on the court file that as Ms Stockinger resided outside the jurisdiction leave to serve outside the jurisdiction was required. Had such leave been sought Mr Ferreira would have been obliged to address questions of domicile, jurisdiction, conflict of law, and forum conveniens in relation to the claims that arise from events outside New Zealand. However, no such leave was sought. Consequently those questions were not addressed.

[17] On 19 February 2013 Ms Stockinger and AHQ filed an application for security for costs supported by an affidavit and a memorandum. They sought to have the time for filing a statement of defence deferred until the security for costs application was determined.[8] Mr Ferreira then took steps to have the Family Court proceedings moved to this Court. On 25 March 2013 Associate Judge Christiansen issued a minute in which he referred to the parties' joint memorandum which advised that the parties were involved in proceedings in the Family Court; that Mr Ferreira intended to bring an application for those proceedings to be removed to the High Court; and that Ms Stockinger would be opposing the application for removal. The minute noted that the parties requested the present proceeding be stayed and that Ms Stockinger and AHQ not be required to file a statement of defence, nor Mr Ferreira to file a response to their application for security for costs. The court file shows that the present proceeding was called in this Court a number of times, but it could not be dealt with due to the parties waiting for a decision from the Family Court on the transfer of the Family Court proceedings to this Court. On 28 March

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[8] It is arguable as to whether by filing this application Ms Stockinger has taken a step in the proceeding which amounts to her submitting to the court's jurisdiction. Mr Ferreira never addressed this issue.

2014 Associate Judge Christiansen issued a minute recording that no hearing date in the Family Court had yet been scheduled. The parties had requested that any further call of the present proceeding be deferred until September 2014, which Associate Judge Christiansen directed. Then on 14 May 2014 Associate Judge Christiansen issued a minute recording the defendants' lawyers had filed an application to withdraw as solicitors on the record. Such leave was granted on 21 May 2014. From then on neither Ms Stockinger nor AHQ took any steps in this proceeding.

[18] In principle, any claims that Mr Ferreira might make in respect of acts or omissions done within New Zealand would not require leave to serve the proceedings on Ms Stockinger overseas.[9] However, any claims made in respect of acts or omissions done outside of New Zealand are likely to fall outside the scope of r 6.27, and so leave to serve overseas would then be required.[10]

[19] With the present proceeding, the allegations on which the first and second causes of action rest are a mishmash of actions, omissions and events that occurred both inside and outside New Zealand. The Court of Appeal has made it plain in *Wing Hung Printing v Saito Offshore* that where there are multiple causes of action there should be separate consideration of whether each cause of action falls within one or more of the paragraphs of r 6.27.[11] Where, as is the case here, the allegations in one cause of action are a mishmash that partly fall within and partly fall without any one of the paragraphs of r 6.27 the result may be that leave is required for the entirety of that cause of action.[12] In my view it is for Mr Ferreira to make out a case for this Court assuming jurisdiction in relation to all aspects of his causes of action. He has not done so.

[20] The problems presented by the form of this proceeding were recognised by Associate Judge Bell. However, as noted his order of 19 December 2012 directing

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9 High Court Rules, r 6.27(2).

10 Rule 6.28.

11 *Wing Hung Printing Co Ltd v Saito Offshore* [2010] NZCA 502, [2011] 1 NZLR 754 at [69]–[72].

12 The equitable estoppel cause of action pleads numerous allegations of advances and representations as to payment, some of which occurred in New Zealand and others outside of New Zealand.

that there be compliance with the rules for service out of the jurisdiction appears to have been ignored.

[21] The failure to comply with Associate Judge Bell's direction means that Ms Stockinger's right to protest jurisdiction has been prejudiced by Mr Ferreira's failure to bring the proceeding in the appropriate form. The notice of proceeding dated 14 December 2012 does not comply with r 6.31 and form G6. This prescribed form of notice to a defendant served abroad is required to contain notification of the right to enter an appearance and object to the jurisdiction of the Court.

[22] At the formal proof hearing the submissions for Mr Ferreira simply proceeded as if New Zealand law applied to all aspects of the proceeding, and there was no impediment to Ms Stockinger being sued as a defendant in New Zealand. Nowhere did the submissions address the topic of conflict of laws, and whether a New Zealand court can have regard to how promises to repay advances of funds might be enforced if made in other jurisdictions.

[23] There is a general principle that it is undesirable to subject a foreigner to this Court's jurisdiction, especially where the claim has little contact with New Zealand, or the claim is dubious.[13] Insofar as Mr Ferreira makes a claim in conversion for tortious acts done within New Zealand this court has jurisdiction to deal with such matters.[14] It is less clear to me whether there is jurisdiction to deal with claims based on equitable estoppel or unconscionable conduct in the present circumstances, as those causes of action are not listed in r 6.27, and Mr Ferreira has not pointed to any other aspect of r 6.27 that might permit this court to deal with those causes of action. Nor was any argument advanced that r 6.29 might permit this court to deal with them.[15]

[24] Furthermore there is an additional procedural problem that Mr Ferreira has failed to address. Rule 15.11 provides that where a document has been served on a party outside New Zealand under r 6.27 and that party has not appeared, judgment

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13 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] All ER 843 (HL).

14 See r 6.27(2)(a) of the High Court Rules.

15 Rule 6.29 allows a Court when service has been effected outside New Zealand without leave and the defendant disputes jurisdiction to assume jurisdiction.

by default against that party must not be sealed without leave of the Court. Before granting leave the Court must be satisfied that the party applying for leave was entitled to effect service outside New Zealand under r 6.27, and there is no reason to believe that service was effected contrary to the law of the country concerned relating to service of documents in domestic proceedings in that country and that service was effected in sufficient time to give the party an opportunity to appear. In the present case Mr Ferreira has not addressed the criteria in r 15.11(2). Thus any judgment by default he obtained may not be able to be sealed, which in turn means that any judgment that is delivered may be futile.

[25] On the other hand there are aspects of the causes of action that strike me as causing them to fail on the merits. For this reason I propose to deal with them now as I see little point in delaying the disposition of this proceeding by providing Mr Ferreira with an opportunity to make submissions on questions of domicile, jurisdiction, conflict of laws and forum conveniens when the causes of action that he relies upon lack merit.

Approach to entry of judgment by default

[26] The present proceedings against Ms Stockinger and AHQ were commenced in 2012. These were stayed for some time. An order was then obtained removing the Family Court proceedings to the High Court and consolidating both sets of proceedings.

[27] An amended statement of claim was filed on 11 March 2015. The defendants never filed a defence. Accordingly, the case falls to be determined by way of formal proof under r 15.9.

[28] Mr Ferreira has provided a huge volume of affidavits and exhibits in support of his claims. The majority of the evidence that he relies on is provided as exhibits to an affidavit sworn in 2009 which runs for 12 volumes and which was filed in the Family Court in support of his claim under the Property (Relationships) Act. He only filed two affidavits in this Court in support of his claim. One affidavit provides updating information from his solicitor which sets out the sale price of the property at Orere Point; the other provides information relevant to costs.

[29] There is something of a disconnect between the evidence that Mr Ferreira filed in the Family Court and the claims in equitable estoppel/unconscionable conduct and conversion that he makes in this court. The evidence he filed in the Family Court has been directed towards proving the extent of the contributions that he made in order to establish a de facto relationship that qualified under s 14A of the Property (Relationships) Act. His claims in equitable estoppel/unconscionable conduct are based upon alleged representations that Ms Stockinger made to him. To pursue those claims he would need, therefore, to prove when each such representation was made and whether he subsequently relied upon each of them to his detriment.[16] His evidence lacks the specificity to achieve this outcome. Much has had to be gleaned from exhibits and inferred from circumstances described in the affidavits.

[30] However, Mr Ferreira faces more difficult problems with the formal proof of his claims, as some of those claims entail the court piercing the corporate veil, and also ignoring the legal frame work that was adopted at the relevant time money was spent and liabilities assumed by Mr Ferreira. Yet he has provided no reasoned argument for why the Court should depart from the established principles as to the separate identities of companies and their shareholders. The fact the parties may have failed to recognise how the law views registered companies is no reason for the Court to depart from well settled law.

[31] In short, the claims are not well presented. In addition, much of the first amended statement of claim pleads evidence to prove elements of the causes of actions that he brings rather than just those elements. The result is a confused mishmash of allegations.

[32] The approach taken by Mr Ferreira may be explained by his counsel's submission on the approach that this court should take when hearing a formal proof. She submitted that as Ms Stockinger has not filed a statement of defence it was not necessary for Mr Ferreira to establish that the legal tests required to prove his claims

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[16] As will be seen later there are New Zealand registered companies involved; many of Mr Ferreira's claims involve the Court paying no regard to the separate legal personality of those companies.

had been met, and that it was only necessary to prove quantum. This is wrong. It reflects how the law regarding formal proof once was.[17]

[33] Now r 15.9 of the High Court Rules applies to a formal proof hearing when no statement of defence has been filed and the plaintiff seeks judgment by default for other than a liquidated demand, which is the case here. This rule provides a mandatory procedure: "it does not involve the immediate entry of judgment by default".[18]

[34] Under r 15.9(4) a plaintiff must establish to a Judge's satisfaction each cause of action relied on and, if damages are sought, provide sufficient information to enable the Judge to calculate and fix the damages. The affidavit evidence required by r 15.9(4) should not include evidence that the Court could not receive if objection was raised by the defendant.[19]

[35] When it comes to the extent to which the plaintiff's evidence is required to satisfy a Judge under r 15.5(4) the presence of r 15.5(5) gives some indication of what may be required. Rule 15.5(5) permits a Judge to direct a deponent of an affidavit to attend the Court to give additional evidence. The fact the rules make provision for a Judge hearing a formal proof to hear from witnesses whose evidence has obviously not been challenged by an opposing party suggests to me that the level at which a Judge is required to satisfy herself regarding the plaintiff's evidence is much the same as it would be if the proceeding had gone to trial. This view of r 15.9 is consistent with the observation of Kós J in *Neumayer* that the r 15.9 procedure may not provide any advantage over allowing matters to run to trial.[20] The view that I take of r 15.9 is also consistent with the very helpful discussion of the earlier version of r 15.9 in *Chen v Zhong,* where Wylie J makes it clear that in a claim for unliquidated damages where no statement of defence has been filed, it does not

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17 See *Dibble Bros Ltd v Tamanui* [1971] NZLR 1144 (SC).
18 *Neumayer v Kapiti Coast District Council* [2013] NZHC 1106 at [8].
19 *Stephens v Cribb* (1991) 4 PRNZ 337 (CA) at 344 which deals with the former rule but which is applicable by analogy to r 15.9(4).
20 *Neumayer v Kapiti Coast District Council*, above n 18, at [8].

necessarily follow that allegations of fact made in the statement of claim are deemed to be admitted.[21]

[36] On the other hand in a formal proof hearing, the plaintiff is only required to prove a cause of action so far as the burden of proof lies on the plaintiff. The plaintiff is not required to engage with any matters of affirmative defences, set-off or counter-claim.[22]

Background facts relevant to equitable estoppel and unconscionable conduct claims

[37] This account is taken from Mr Ferreira's affidavits and from other affidavits that he referred to either in his submissions, or the chronology of events that he relied upon.

[38] In 2004, Mr Ferreira and Ms Stockinger decided that they wished to purchase land in New Zealand and to move to this country. In late October they visited New Zealand and looked at a property at Orere Point.

[39] They were advised by their then lawyers in New Zealand, Hesketh Henry, to form two companies to represent each of their interests in New Zealand. Correspondence from Hesketh Henry to a German lawyer Dr Caroline Picot reveals that they were advised that to obtain approval from the Overseas Investment Commission (OIC) the two blocks of land they were interested in purchasing would need to be acquired separately as any joint acquisition would make it more difficult to obtain OIC approval. I also gained the impression from Mr Ferreira's evidence that they each had a better chance of obtaining residence in New Zealand if they each invested in a New Zealand business.

[40] One of those companies was AHQ, which was incorporated to represent the legal and business interests of Ms Stockinger. She became the sole director and shareholder of AHQ. The other company Agape Holistic Retreat Corporation (AHR) was incorporated to represent the legal and business interests of Mr Ferreira. He

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[21] *Chen v Zhong* HC Auckland CIV-2010-404-1995, 14 November 2011 at [37]–[42]. At the time this case was decided the High Court Rules did not specifically provide for formal proofs.

[22] *BBC Technologies Ltd v Sociedad Agricola Topagri Ltda* [2014] NZHC 2386 at [5].

became the sole director and shareholder of AHR. Both companies were incorporated on 28 October 2004. AHR was to carry on a retreat business and AHQ a horse stud business.

Relationship and Sums Provided

[41] A brief outline of the relevant events is helpful to understanding the claims. I have divided the relationship between the couple and the contributions provided at each stage of the relationship into four different sections: prior to 15 May 2005; from 15 May 2005 to September 2005; from September 2005 to May 2006; and from May 2006 onwards. The account of events is taken from Mr Ferreira's evidence. I have taken into account affidavits of Ms Stockinger and the exhibits attached thereto insofar as this evidence was referred to by Mr Ferreira in his chronology to establish the sequence of relevant events.

Prior to 15 May 2005

[42] Mr Ferreira and Ms Stockinger met in Germany in late 2003 and began a de facto relationship in January 2004.[23] Mr Ferreira has two children from a previous marriage and Ms Stockinger has one child from a previous marriage. They have no children together.

[43] Mr Ferreira is an author. Mr Ferreira states that at the start of the parties' relationship, Ms Stockinger owned considerable assets "worth tens of millions of Euros" including shares in OVB Holding Corporation (a media and publishing holding company), a number of valuable pieces of real estate including a house with apartments in Berlin, a wind power facility, a horse stud farm and a number of valuable horses.

[44] In January 2004, the couple viewed a mansion in Germany called Lichtung which they were interested in purchasing together. They decided that Ms Stockinger would purchase the property in the name of Geoglobe Development Corporation. Ms Stockinger was the sole shareholder of this company. Ms Stockinger later

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[23] I use the term to describe an emotional, personal, intimate relationship that involves sexual relations and periods of cohabitation.

purchased Lichtung in her own name. The total purchase price of the property was €1.8 million. Mr Ferreira contributed €360,000 towards the purchase price. This sum is made up of a payment of €310,000 to the notary in charge of the sale, €30,000 to Ms Stockinger's company account and a €20,100 cash withdrawal which Mr Ferreira said was given to Ms Stockinger to cover real estate agent's fees.[24]

[45] In March 2004, the couple viewed and decided to buy a Catamaran which was then in the process of being built. They called the yacht "Agape". Mr Ferreira does not identify the country in which they viewed and purchased Agape however, it was purchased by Ms Stockinger at a cost of €1,800,000, which suggests it was purchased in a country other than New Zealand. Mr Ferreira's evidence is that Ms Stockinger said she would buy Agape as a present for him. She paid the deposit but could not make the first instalment payment so Mr Ferreira contributed the €300,000 (NZ$540,000) deposit towards the purchase price of the yacht.[25] Later the yacht was registered in the name of Agape Corporation Ltd, which was a company registered in both parties' names in the Cook Islands. In December 2006, Agape Corporation Ltd was transferred into Ms Stockinger's sole name.

[46] Between May and September 2004, the couple lived together at Ms Stockinger's home in Germany. They went to the Mediterranean on holiday in the yacht for five weeks beginning at the end of August 2004.

[47] In late October 2004 the couple visited New Zealand and looked at the property at Orere Point. After this and on advice from New Zealand lawyers Hesketh Henry AHR and AHQ were incorporated.

[48] On 1 April 2005, AHR purchased a large farming property in Gisborne ("Mahutai Park") for $2.2 million. Ms Stockinger contributed €1,100,000, or $1,980,000, towards the purchase price of the property.

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[24] Bank account statements provided in evidence show that these transactions were made.

[25] The conversion rate used is that provided by Mr Ferreira in his evidence and represents a ratio of NZ$1.80 per € which he states was the approximate exchange rate during 2005, when most of the Euro transactions occurred. A UBS bank statement shows that the deposit was paid on 19 May 2004.

[49] On 4 May 2005, AHQ purchased the property at Orere Point Road for $11.5 million. Bank statements show that Mr Ferreira paid $700,000 from his UBS Swiss bank account into Hesketh Henry's trust account to be used towards the purchase price of this property. $6,500,000 of the price was financed by a loan from BNZ. Ms Stockinger paid the balance. To enable Ms Stockinger to make the final payment of $1,000,000 in August 2005 she borrowed a further $1,000,000 from the BNZ, which was guaranteed by AHR.

[50] Mr Ferreira states that he spent a total of $221,400 for the benefit of Ms Stockinger between February 2004 and May 2005. The amount claimed represents various payments relating to the upkeep for Litchung, expenses relating to the yacht, travel expenses and payments relating to Ms Stockinger's horse stud, lawyers and employees.

[51] From what I can see no receipts for these payments are in evidence. The amounts claimed for each item are set out in a schedule to a letter written on 26 April 2007 from Mr Ferreira's lawyers Rennie Cox, to Ms Stockinger's lawyers at the time, Buddle Findlay. This letter states that most, if not all of the amounts claimed can be substantiated by receipts if necessary.

[52] During this time, Ms Stockinger made a number of financial contributions towards Mr Ferreira's costs and repaid amounts that he had advanced to her. On 9 April 2005, she paid for flights for Mr Ferreira and his son to New Zealand, totalling €16,000 or $28,800. Ms Stockinger also gave him gold bars worth €21,000, or $37,800 which he cashed on 31 March 2005. Finally, she reimbursed him €20,000 or $36,000 and paid a €3,171.76 or $5,709.17 invoice for a tax lawyer on his behalf.

[53] In total, including her contribution to the purchase price of Mahutai Park, Ms Stockinger made contributions totalling $2,088,309.17 for Mr Ferreira's benefit.[26] By contrast, Mr Ferreira alleged that he spent $2,109,580, leaving a total inequality of contributions of $21,270.83. However, a large part of the sum

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[26] This is taken from his evidence; as it amounts to an admission adverse to his interests I am prepared to rely on it.

Mr Ferreira claims he had then contributed was spent outside New Zealand and at a time when the parties were not living in New Zealand.

[54] However, unless Mr Ferreira can prove that: (a) Ms Stockinger has acknowledged he contributed a sum of $2,109,580; (b) she represented she would repay this sum to him; and (c) he altered his position in reliance on that representation I am not prepared without hearing more from him to pay regard to spending that occurred either before the parties came to New Zealand or was made in relation to assets outside New Zealand.

15 May 2005 to September 2005

[55] In May 2005 Mr Ferreira learned that the German tax authorities were investigating his tax affairs and that a warrant had been issued for his arrest. He could not return to Germany.[27] However, he went to Switzerland so that he could be close to Germany to allow him to sort out his tax affairs.

[56] On 15 May 2005 Ms Stockinger emailed Mr Ferreira saying that she wished to end the relationship. Mr Ferreira relies on this email as constituting an acknowledgement from Ms Stockinger that each had made roughly the same financial contributions. She also records suffering cash flow problems. In this email she said that:

> I think we are almost on a par financially, we should just fix everything as well. If I take the payment for the 'litchtung', the catamaran, and the missing some [sic] from Orere Point, then that is almost the purchase price of Mahutai estate. Here we can make some exchanging loan agreements. …

[57] However, this comment forms a small part of a large personal email that covers their relationship and other family members including their respective children, their parents and their former partners. I read the email as suggesting how the parties might manage their affairs in the future rather than as expressing a firm view on the present state of their affairs or offering a way of resolving them. This view is confirmed by Mr Ferreira's reply email, which includes the comments:

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[27] Mr Ferreira offered an explanation in his affidavit for why the German tax authorities were investigating him. However, it is no more than his opinion and accordingly it is inadmissible.

> I know that we don't have anything to settle up, totally the opposite, as you paid basically for everything anyway that that is something that I really appreciate. Dani, you have always helped me, be it with the children, or in any other regard. Even when I know and feel that you did everything willingly without even having to think it over, it wasn't always so pleasant for me, as I would have preferred to have contributed more financially, so that you didn't have the feeling that you always paid for everything. For that reason you are entirely right and find your decision correct that we separate the business things. This gives me as well a better feeling and then I don't have to have mine dependent on you.

[58] Mr Ferreira states that on 17 May 2005, having received Ms Stockinger's email, he provided €100,000 to Ms Stockinger to alleviate her immediate financial difficulty. Nowhere in the email of 15 May 2005 did Ms Stockinger ask Mr Ferreira for financial help, though she does outline the financial plight of Mr Ferreira's father as well as someone called Gunther. A letter written by Mr Ferreira's friend, Mr Dalcilic, on 23 April 2007 states that he received this amount in cash from Mr Ferreira in Switzerland and took it to Ms Stockinger in Germany. Mr Dalcilic's letter is hearsay evidence. There is no contemporaneous record to confirm that Ms Stockinger either sought or received this sum of money for herself, let alone at all. I am not prepared to treat Mr Dalcilic's evidence as reliable in terms of s 18 of the Evidence Act 2006.

[59] In late May or early June 2005 the parties resumed their relationship. On 15 June 2005, Mr Ferreira says that he gave Ms Stockinger €35,000 in cash in Switzerland and asked her to make some payments on his behalf in Germany. He was still unable to travel to Germany at this time.

[60] Between May and September 2005, the couple travelled a fair amount. In June 2005 they went to Switzerland. In July they flew to New Zealand, to make arrangements in relation to the purchase of the Orere property and to Tahiti to visit the yacht which was anchored there due to storm damage. In August 2005 they had a holiday in New Zealand.

[61] On 2 August 2005 AHR signed a $1 million guarantee over AHQ's obligations to the BNZ. This guarantee was made in order for AHQ to be able to pay the last part of the purchase price due on the Orere Point property. The guarantee was covered by a registered mortgage security that BNZ held over Mahutai Park.

The mortgage secured all monies that were then or in the future owing either directing or indirectly to BNZ.

[62] For the period from May to September 2005 Mr Ferreira states that he spent $86,143.20 in "miscellaneous expenses", comprising travel expenses for various people including a friend, Ms Stockinger, her daughter, nanny, Mr Ferreira and the yacht's capital, and expenses for the yacht's captain and skipper.

[63] From my review of the evidence I can only see that $3,449.84 is substantiated by receipts. Without receipts I would not be prepared to accept Mr Ferreira's testimony regarding the $86,143.20 he claims to have spent.

[64] Ms Stockinger also made payments in favour of Mr Ferreira during the period between May and September 2005 totalling €53,066, or NZ$95,519.

September 2005 to May 2006

[65] In September 2005 the couple moved in to the Orere Point Property.

[66] Between September 2005 and May 2006 Mr Ferreira states that he made numerous payments totalling $286,758.09 using his personal credit cards for or on behalf of AHQ for business purchases and expenses and to help with the company's cash flow. AHQ in turn repaid $227,875.47 of the amount advanced by 2 May 2006.

[67] During the same period, Mr Ferreira states his company, AHR, also made payments to AHQ and paid for legal fees amounting to $63,146.26. AHQ paid back the total $63,146.26 in three instalments.

[68] Mr Ferreira points to the occasions when AHQ repaid sums advanced as evidencing a pattern of conduct where money was advanced and subsequently repaid, which in turn led him to expect that this is how things would continue when it came to future advances that either AHQ or Ms Stockinger received.

May 2006 onwards

[69] From May 2006, AHQ's financial position substantially deteriorated and BNZ began putting pressure on Ms Stockinger to sell her assets in Germany. To this end Mr Ferreira states that he spent a large portion of the year overseas in an attempt to find buyers for the assets.

[70] In May 2006, Mr Ferreira sailed in the yacht to Fiji, flew to Switzerland and met Ms Sockinger in Dubai in June 2006 before flying back to Switzerland. He did not return to New Zealand until 23 October 2006.

[71] Mr Ferreira claims that he transferred a $10,000 payment and a $250 payment from AHR to Ms Stockinger on 14 June 2006. Ms Stockinger repaid $10,000 to AHR on 4 July 2006.

[72] On 7 August 2006, Mr Ferreira states that he transferred $260,000 to AHQ's bank account. An internet bank transfer of this amount at that time is shown in the company's bank statements.

[73] Mr Ferreira also claims credit card expenditure from May 2006 to January 2007. The actual amount claimed is $147,578.42 though by my calculation this figure should be $113,314.91. Of the amount claimed, all but six amounts are shown in Mr Ferreira's credit card statements. The remaining amounts, totalling $7,440, are made up of cash amounts or cash withdrawals, for which it is not possible to tell if they were used for the purpose claimed. This period covers the time when Mr Ferreira sailed to Fiji. In his affidavit he states that he covered a lot of expenses on Ms Stockinger's behalf associated with the voyage which he said was entirely for Ms Stockinger's benefit as the yacht was being chartered in Fiji. It also covers his time in Switzerland and Dubai. Thus these expenses were incurred outside New Zealand. Mr Ferreira states that he has not halved any of the expenses as he considers that they were incurred entirely for the purpose of meeting and negotiating with potential buyers of Ms Stockinger's property. Further, he states that, had it not been for Ms Stockinger's pressing need for more cashflow and urgent need to sell her German assets, he would probably have spent the majority of 2006 in New Zealand. He states that he would certainly not have incurred the high level of travel,

accommodation and other expenses that he did incur. The amount claimed includes expenses such as equipment for the yacht, food and supplies, payments for the skipper, a number of dinner and business lunches, airline tickets for the skipper, Mr Ferreira and his friend, who accompanied him to help with finding buyers, as well as clothing, accessories and presents bought for Ms Stockinger and her daughter.

[74] On 07 August 2006, while out of New Zealand, Mr Ferreira made a payment to Ms Stockinger's caretaker in Germany for her unpaid wages. Mr Ferreira's bank statements show this transaction of €38,000.

[75] On 29 September 2006 Mr Ferreira transferred $30,000 to Ms Stockinger. This transaction is shown in his bank statements.

[76] Mr Ferreira returned to New Zealand on 23 October 2006.

[77] Following Mr Ferreira's return to New Zealand on 23 October 2006, in November 2006, the parties agreed to separate. Mr Ferreira states that the separation was amicable, as by that time both parties had met other partners. He alleges that Ms Stockinger agreed that he could live in the apartment at Orere Point with his new partner. Mr Ferreira refurnished and moved into the apartment.

[78] In November and December 2006 he states that the parties discussed and agreed to Mr Ferreira selling Mahutai Park so that the proceeds could be used, if needed, by AHQ until the proceeds from the sales of Ms Stockinger's German assets came through.

[79] A file note from Brent Baldwin of Hesketh Henry lawyers, dated 13 December 2006, is in evidence documenting a meeting where Mr Ferreira discussed repaying part of the BNZ mortgage in favour of AHQ in exchange for him becoming a shareholder in AHQ. The purpose of doing so, as documented by Mr Baldwin, was to enable Mr Ferreira to continue to satisfy the investment requirements necessary to support his application for residency in New Zealand.

[80] There is also evidence that around November and December 2006 the BNZ were threatening a mortgagee sale of Mahutai Park. AHR entered into an agreement to sell Mahutai Park for $1.95 million. Mr Ferreira states that he sold Mahutai Park in reliance on assurances from Ms Stockinger that the proceeds would be available for AHQ to use until she sold her "German assets". He also states that Ms Stockinger offered him a security over Orere Point or a shareholding in AHQ, until she had reimbursed him for "all [his] payments." He says nothing about the fact that the bulk of the payment to acquire Mahutai Park was provided by Ms Stockinger.

[81] On 18 December 2006 AHR executed a further guarantee of $1,820,000 of AHQ's indebtedness to the BNZ.

[82] In January 2007, Mr Ferreira went on holiday to Fiji, leaving most of his possessions at the Orere Point property. He attempted to return to New Zealand on 15 January 2007 but was told at the airport that he was unable to enter New Zealand as Immigration Officials had received a tip off that he was a "wanted criminal". Mr Ferreira states that on 17 January 2007 he received a call from the BNZ about how he was going to balance his accounts. The bank informed him that Ms Stockinger had not given assurances to cover anything owing on his accounts. Mr Ferreira states that he called Ms Stockinger, who stated that if the bank needed anything, she would immediately give it.

[83] On 19 January 2007 the BNZ informed Mr Ferreira that it would be blocking his credit cards. The BNZ told Mr Ferreira that Ms Stockinger had alleged that: he owed her money; the couple had separated; Mr Ferreira was a wanted criminal;[28] and he had left New Zealand and would not be returning because of problems with Immigration. The BNZ said it was going to apply the net proceeds of the sale of Mahutai Park to the mortgage over Orere Point. The bank was not prepared to wait until the sale of Ms Stockinger's windmill farm, which was expected to return NZ$2,400,000 in February. The bank also said that it would not reimburse AHR for the amount applied to AHQ without Ms Stockinger's consent.

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[28] This is in relation to the German tax authorities investigating his affairs.

[84] Mr Ferreira states that when he called Ms Stockinger, she said that it was all a big mistake. However, later she sent him a text stating that she never wanted to see him or talk to him again.

[85] A number of emails sent from Ms Stockinger to Mr Ferreira are provided in evidence. On 23 January 2007 she stated that "After everything goes smoothly, we could also 'divide between us' and maybe everything will get sorted out again after some time." In another email on that day she states that she did guarantee Mr Ferreira's credit cards and that they were "being played" by the bankers. She also stated that "I owe you money and you took over many costs lasts year" and then later:

> Therefore, I believe it's best now to end once and for all and part our ways. I always wanted that in business, as you know. I never made a secret of it. I would never have allowed a mishmash either, if it were not always the urgency and the pressure from the banks. I already wrote to you that I want to count everything, and neither one of us should say in the end that he was betrayed, but right now the priority is to ensure my survival. I know I can't hold you responsible for what I've done financially in the past years. …

[86] A later email sent by her on 23 January 2007 states:

> Don't forget please that we are not only tied commercially, but also privately. To tell half-truths is also a lie. Also, I don't know what's the point, as I said it's something between us and no one can say precisely who owes whom what or not. Making statements about it is not really that nice. It is correct that my things were paid with your transfers, but the rest of the time my funds were also taken to cover my and your costs, and if you really want a "War of the Roses", then we can go through each receipt together with all bank that were involved.
>
> …

[87] The email ends by saying "so let's just agree that we will separate our finance and part our ways. Not in a hurry and half-truth but really honestly."

[88] In an email on 24 of January 2007 Ms Stockinger disputed the calculations that Mr Ferreira had made as to each party's contributions stating "I always said I'd like to make a final calculation, it came from me, and I know that the numbers should work on both sides."

[89] When the sale of Mahutai Park settled on 1 February 2007 Mr Ferreira's lawyers transferred the proceeds, being NZ$1,942,596.51, into AHR's BNZ account. The BNZ then applied the funds to repay cheque and credit cards accounts of either AHR or Mr Ferreira with the balance of NZ$1,740,000 being transferred into AHQ's BNZ account. This was in settlement of AHR's liability under the guarantee that it had given to the BNZ of AHQ's indebtedness to the bank.

[90] On 8 February 2007 Mr Ferreira received an email stating that the BNZ had closed his accounts due to unsatisfactory account history, lack of evidence of his financial position and ongoing doubts as to his residency.

[91] On 9 March 2007 Ms Stockinger informed Mr Ferreira that she did not want him living on the Orere Point property. On 11 March 2007 the caretaker informed him that his possessions had been put in boxes.

[92] Mr Ferreira was permitted to return to New Zealand on 16 March 2007 though it is likely that he would have left again after his application for residence was refused in June 2007.

Background facts relevant to claim in conversion

[93] This account is taken from Mr Ferreira's evidence.

[94] During the time that he was out of New Zealand, Mr Ferreira had left his possessions in the Orere Point Apartment. Mr Ferreira states that while he was away he left the key to the apartment with the caretaker. Ms Stockinger collected the key and entered the apartment. He states that he later found out that she had uplifted his business records in January and given them to the German Tax Authorities.

[95] On 21 March 2007 he was served with trespass notices. Having attempted to negotiate to get his possessions back he eventually got some of them back on 21 March 2007. After correspondence between the parties' lawyers, he was then able to send his agents to collect more of the possessions. Of the possessions which were available to collect he contends that many were damaged beyond repair. Further, a number of the possessions were missing, and some of the more valuable items had

been replaced with cheaper items. His computer drive was reformatted, which permanently deprived him of valuable software, photographs, emails, documents and scientific records. He states that the total damage to property and the value of property not returned amounts to $300,000.

[96] Mr Ferreira had left a purebred Arabian stallion, Esstashan, at the Orere Point property. Mr Ferreira attempted to get the horse back from Ms Stockinger in early 2007. Ms Stockinger initially stated that the horse was owned by AHQ as it was listed in AHQ's accounts as an asset of the company. On 27 April 2007 Ms Stockinger's lawyers acknowledged that the horse belonged to Mr Ferreira and stated that she was prepared to release the horse upon him paying her the cost of shipping and costs for stabling the horse at Orere Point for 39 months and the cost of importing him to New Zealand. She was thus claiming a lien on the horse for those costs. The total claimed was $61,300. This was later increased to $63,400. Mr Ferreira agreed to pay this amount into a neutral trust account, to be held as a stakeholder by BDO Spicers.

[97] However, it appears that the parties continued to dispute matters concerning the horse and Mr Ferreira was unable to repay the $63,400 to secure the horse's release for some time. In the meantime the parties agreed that the horse would be stabled at a horse stud, Landseer Stud, in Pukekohe. The arrangement with this horse stud was that Esstashan was being held by Landseer Stud as an agent for Ms Stockinger. It agreed not to release the horse without written approval from Buddle Findlay.

[98] Mr Ferreira paid the $63,400 to BDO Spicers on 5 September 2008 and the horse was released in late October 2008. Mr Ferreira claims the $24,819.03 he paid in stabling costs to Landseer Stud up until this time. Mr Ferreira also states that he had a buyer interested in the horse in early 2007, and that Ms Stockinger's actions prevented him from selling the horse then and not incurring the stabling costs.

[99] Two amounts are claimed for conversion: $300,000 for his chattels that were lost or damaged by Ms Stockinger; and $24,819.03 for stabling costs for Esstashan.

Earlier proceedings

[100] In late 2007 Mr Ferreira brought summary judgment proceedings against AHQ through AHR, seeking to recover $1.74 million which it had received out of the sale of the Mahutai Park property. AHQ opposed the application. The Associate Judge considered that the defences raised by AHQ involved evidential disputes which meant that the case was unable to be determined by way of summary judgment. He made a number of other comments about the proceedings as well but in my view the core reason for their dismissal was his finding that they were not suitable for disposition by way of summary judgment. Thus the refusal to grant summary judgment cannot be equated with the dismissal of those proceedings.

[101] In 2009 Mr Ferreira brought proceedings in the Family Court under the Property (Relationships) Act 1976. Ms Stockinger denied that the parties had been in a qualifying de facto relationship and sought an order of security for costs. A hearing took place on 11 March 2011 and Judge Burns delivered a judgment on 11 October 2011. Judge Burns found that the pool of relationship property would be of a very limited value, and further that the arguments against the parties being in a de facto relationship were persuasive. Judge Burns also considered that Mr Ferreira's impecuniosity was as much his responsibility as anyone else's. Accordingly, he awarded security for costs against Mr Ferreira.

[102] One of the reasons for the Judge's decision to award security for costs was Ms Stockinger's evidence as to the existence of a €1,100,000 loan in favour of Mr Ferreira from Ms Stockinger signed by Mr Ferreira on 9 September 2005. Mr Ferreira's evidence in relation to this agreement is that Ms Stockinger created it using blank sheets of paper with his signature on it taken from his apartment. He denies that the loan document is genuine.

[103] After the present High Court proceedings against Ms Stockinger and AHQ were commenced an order was obtained removing the Family Court proceedings to the High Court and consolidating the proceedings.

Analysis

Equitable Estoppel

[104] The first cause of action against the first defendant is based on equitable estoppel. A unified doctrine of equitable estoppel is now recognised in New Zealand, the underlying principle being that a party will not be permitted to deny any assumption, belief or expectation that it has allowed another to rely on where such a denial would be unconscionable.[29]

[105] Estoppel can only be relied on where some action, representation or omission to act has been carried out by or on behalf of the defendant causing the plaintiff to have acted in a manner causing loss.[30] In *HHR Christchurch NTL Ltd v Crystal Imports Ltd* the Court of Appeal found that, in the context of an appeal against a summary judgment where the plaintiff argued that the defendants were estopped from denying that its interest in a Hotel was insured, the plaintiff had to show:[31]

(a) The defendant had created a belief or expectation through some action or representation that the plaintiff's interests were insured;

(b) The plaintiff's belief or expectation was reasonably relied on;

(c) The plaintiff would suffer detriment if that belief or expectation were departed from; and

(d) It would be unconscionable for the defendants to be allowed to depart from that belief of expectation.

[106] To the extent that an express representation is relied on, this must be clearly and unequivocally expressed.[32] In relation to whether the expectation was reasonably relied on, this requires the belief or expectation to be reasonably held, it

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29 See for example *Fanshawe 136 Ltd v Fanshawe Capital Ltd* [2013] NZHC 3395 at [49] citing *National Westminster Finance New Zealand Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA) at 549.

30 *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86.

31 *HHR Christchurch NTL Ltd v Crystal Imports Ltd* [2015] NZCA 283 at [44].

32 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

must have been reasonable for the plaintiff to rely on the belief, and their ongoing reliance must have been reasonable.[33] Reasonableness will be judged by the standard of a reasonable person in the particular circumstances.[34] Accordingly, the fact that the representation arises in a family context as opposed to a commercial context will be relevant.[35]

[107] Reliance on the representation may consist merely of the plaintiff abstaining from some course of action which they possibly would have taken if the representation had not been made.[36]

[108] However, equitable estoppel is usually invoked to enforce non-contractual promises or representations. This can be seen from a review of the relevant authorities. When its requirements are satisfied equitable estoppel operates to fill what would otherwise be a legal lacuna, and in this way it provides a remedy when there would otherwise be none:[37]

> The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled will be suffered by the party who has been induced to act or to abstain from acting thereon.
>
> If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises as enforceable as contractual promises can be allayed.

[109] The corollary of the above statement is that equitable estoppel has no application when an established common law cause of action and remedy is available to rectify the detriment that would otherwise be suffered. Unless this is recognised, equitable estoppel may impinge on areas where there are already well established remedies, particularly as equitable estoppel now operates as a cause of action as well as a shield.[38] This is especially so when, as is the case here, equitable estoppel is being used as a cause of action for which the plaintiff seeks equitable

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33 James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [19.2.2].

34 See for example *Travel Agents Association of New Zealand Inc v NCR (NZ) Ltd* (1991) ANZ ConvR 553 (HC).

35 See *Pollard v Pollard* [2015] NZHC 1140 at [59]; and *Harris v Harris* (1989) 6 FRNZ 1 (HC).

36 *Laws of New Zealand* Estoppel: the Effect of Estoppel by Representation (online ed) at [49].

37 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 423 cited with approval in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*, above n 32, at [84].

38 See *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*, above n 32, at [80].

damages as the remedy. In such circumstances the enforcement of a promise to pay a sum of money that party A has provided by an award of equitable damages against party B, which is equivalent to the sum advanced, starts to look much the same as the recovery of an unpaid loan by an action for repayment of a debt. Where the promise to pay was made by someone other than the party to whom the money was provided and it is not honoured those circumstances look very much like the circumstances that support an action for indemnity. It is important, therefore, to ensure that the broad statements of principle in the case-law that outline the application of equitable estoppel are not simply applied to all circumstances that appear to fit literally within them.

The advances

[110] The thrust of Mr Ferreira's argument is that on numerous occasions he caused money to be advanced to Ms Stockinger and AHQ throughout the parties' de facto relationship and that she created an expectation that she would repay those advances. I consider that it is important to examine each such occasion discretely.

[111] The biggest advances that were allegedly made for Ms Stockinger's benefit were when Mr Ferreira, acting on behalf of AHR, executed guarantees to the BNZ of AHQ's indebtedness. There were a chain of such guarantees.

[112] The first such guarantee was provided on 4 May 2005 when Mr Ferreira caused AHR to give a $1,000,000 guarantee to the vendor of the Orere Point property.[39] He alleges that he did so because Ms Stockinger represented to him that she was expecting to receive funds from the sale of her "German OVB" shares and when she did he would be reimbursed for any costs he had incurred as a result of her representations.[40]

[113] A letter from Hesketh Henry dated 28 April 2005 reveals that when the Orere Point property was purchased as the vendor could not give vacant possession on

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[39] See [8.4] of the first amended statement of claim.
[40] See [9] and [10] of the first amended statement of claim.

settlement $1,000,000 of the purchase price was to be withheld.[41] Letters exchanged between the solicitors acting for the vendor and purchaser show that at the time the vendor could not demand payment of this sum. Initially, the deferred payment was to be held in a solicitor's trust account, but then it was decided that AHR would guarantee this amount. Mr Ferreira says that at the time Ms Stockinger did not have the funds to place in a solicitor's trust account.

[114] Subsequently when the vendor was able to provide vacant possession of Orere Point the deferred payment of $1,000,000 became due and payable. At that time Ms Stockinger still had no funds to make the payment and so in August 2005 Mr Ferreira had AHR provide a guarantee of $1,000,000 to the BNZ to secure funds to make the deferred payment.

[115] Although Mr Ferreira does not mention it in his evidence, the August 2005 guarantee by AHR was supported by a mortgage to the BNZ over Mahutai Park. This evidence is to be found in the affidavit of Nicholas Hanson who gave evidence for the BNZ in its opposition to AHR's application for summary judgment. A copy of Mr Hanson's affidavit was annexed as one of the exhibits to the affidavit of Ms Stockinger dated 18 May 2010 which she filed in the Family Court proceedings. Those proceedings were transferred to this Court. The evidence filed in the Family Court proceedings is now relied upon by Mr Ferreira to prove his claim in this proceeding. Further, in the chronology he filed in this proceeding he at times refers to Ms Stockinger's affidavit of 18 May 2010 and Mr Hanson's affidavit which is attached as an exhibit to Ms Stockinger's affidavit. Since Mr Ferreira has chosen to rely on parts of Ms Stockinger's affidavit, which includes the attachment of Mr Hanson's affidavit, I consider that I am at liberty to read Mr Hanson's affidavit in its entirety, otherwise there is a risk that the passages to which Mr Ferreira refers will be read out of context.

[116] The BNZ loan was short term and it was repaid by Ms Stockinger on 3 February 2006. However, the guarantee that AHR had provided to the BNZ remained alive. Mr Hanson deposes that this guarantee was not discharged.

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[41] Someone associated with the vendor continued in residence in one of the dwellings on the property for some months.

[117] In his affidavit dated 19 October 2009 Mr Ferreira deposes that because around February 2006 Ms Stockinger wanted funds to develop Orere Point, he allowed the AHR guarantee to continue and so it was then used to support a further $1 million loan from the BNZ to AHQ. The BNZ referred to this loan as the number 3 loan.

[118] The number 3 loan went into default when it was not repaid on 30 September 2006. After 30 September 2006 the evidence of Mr Hanson shows that the BNZ wanted their loans repaid. Further, Mr Hanson's evidence reveals that Mr Ferreira was looking for a buyer for Mahutai Park and expected that when it was sold the proceeds would have to be applied to meet AHR's obligations to the BNZ, which included the repayment of AHQ's by then overdue loans.

[119] AHR provided the BNZ with details of the prospective sale of Mahutai Park. When the BNZ learned that Mahutai Park was the subject of a sale and purchase agreement that was due to settle in January 2007 it sought to resolve the credit situation of AHQ by rolling its loans into one temporary overdraft which was to be covered, amongst other things, by a guarantee from AHR on the same terms as before, which included the mortgage security over Mahutai Park. This guarantee was to support the current indebtedness of AHQ, which by then included:

(a) accrued interest on the original loan to AHQ to acquire Orere Point (the number 1 loan);

(b) accrued interest on the $1m loan to pay the balance of the Orere Point purchase price (the number 3 loan);

(c) the unpaid principal of the number 3 loan, which stood at $1m; and

(d) ongoing expenses including personal advances, credit cards and renovation work at Orere Point.

The total indebtedness came to approximately $1,820,000. This led the BNZ to require AHR to provide a guarantee of up to $1,820,000, which was in terms identical to the earlier guarantee that was given on 2 August 2005.

[120] In his affidavit dated 19 October 2009 Mr Ferreira deposes that he did not realise that on 18 December 2006 he signed a guarantee for AHR of AHQ's debt up to the sum of $1,820,000. He says he thought he was signing documents for the BNZ to do with the sale of Mahutai Park. He does acknowledge, however, that he said to the BNZ that the proceeds of Mahutai Park could be used to repay AHQ's debts to the BNZ.

[121] In the amended statement of claim Mr Ferreira alleges that as a result of Ms Stockinger's representations he did not try to halt the sale of Mahutai Park and instead allowed the sale to proceed, further he did not object to the BNZ applying the sale proceeds to reduce AHQ's debt.

[122] Also in his affidavit dated 19 October 2009 Mr Ferreira refers to discussions that he had with Ms Stockinger regarding the sale of Mahutai Park. He describes it as the two of them coming to an agreement that as he and his new partner, Jasmine would now be living at Orere Point, he no longer needed Mahutai Park as a place to live. He said that in this way the sale proceeds of Mahutai Park would be available for AHQ if needed until Ms Stockinger received loans she was going to obtain from overseas, and proceeds from the sale of her German assets became available.

[123] Mr Ferreira deposes that Ms Stockinger referred to the money and help he had given her in the past and asked if he would be happy for her to give him a security over Orere Point, or a shareholding interest in AHQ until he had been completely reimbursed for all his payments. He deposes "it was on this basis that I sought a buyer for AHR's Mahutai Park property and entered into an agreement to sell it in mid/December 2006."

[124] Mr Ferreira also deposes that "on 12 December 2006, relying on [Ms Stockinger's] assurances, I entered into an agreement to sell Mahutai Park for $1.9 million so that some of the proceeds of the sale could be used to reduce AHQ's

mortgage debt …" pending the sale of Ms Stockinger's assets in Germany. Mr Ferreira says he informed the bank he was doing this and that some of the proceeds could be used to reduce AHQ's mortgage pending sale of Ms Stockinger's assets in Germany.

[125] Mr Ferreira further deposes that as a result of relying on Ms Stockinger's assurance that she would give AHR security over the Orere Point property and would "square things up" later, he allowed the sale of Mahutai Park to go ahead and "confirmed to the BNZ that the net proceeds after paying off my credit cards and AHR's credit cards could be applied to the reduction of AHQ's BNZ overdraft." However in the same affidavit he also deposes that on 19 January 2006 he was informed by Ms Reardon of the BNZ that after balancing out all his personal and company accounts the BNZ would apply the remainder of the proceeds from the sale of Mahutai Park towards reducing the mortgage over Orere Point, which AHR had guaranteed. The reference to 2006 must be a typographical error as the circumstances point to the contact with Ms Reardon being on 19 January 2007.

[126] Then in a later affidavit dated 24 May 2013 Mr Ferreira deposes that had he known Ms Stockinger would not pay him back and deny he had any interest in Orere Point or that she owed him anything, he would never have agreed to sell Mahutai Park, nor to guarantee AHQ's indebtedness to the BNZ in December 2006.

[127] The tenor of Mr Ferreira's evidence is different from Mr Hanson's. Mr Hanson's evidence shows that from 30 September 2006 onwards the BNZ was concerned that the existing level of indebtedness was not being repaid on time. Further, that from October 2006 onwards the BNZ was pressing for payment. From August 2005 the BNZ had held a mortgage over Mahutai Park to support the guarantee given by AHR of AHQ's indebtedness. So, the BNZ was in a position to force the realisation of Mahutai Park, and to have the proceeds applied to reduce AHQ's debt well before the new guarantee was executed on 18 December 2006.

[128] On the other hand the way in which Mr Ferreira describes the situation it is as if he had a choice in December 2006 as to whether Mahutai Park was sold and how the sale proceeds would then be applied.

[129] There is the separate matter of him saying on oath that he did not realise the papers he signed for the BNZ on 18 December 2006 included a guarantee of AHQ's debts. It is hard to see how in the affidavit dated 24 May 2013 he can claim he never would have given the BNZ a guarantee in December 2006 if he had known Ms Stockinger would not repay him, when he had earlier deposed to not realising that he was giving this guarantee. In this regard his evidence is not consistent.

[130] The evidence of Mr Hanson shows that the BNZ was always in a position to demand the proceeds of the sale of Mahutai Park be applied to reduce AHQ's debt to the BNZ, and that any sale of this property could not have proceeded without the agreement of the BNZ, given that it held a registered mortgage over that property.

[131] It is clear to me from Mr Hanson's evidence that at the relevant times AHQ's indebtedness to the BNZ was not being repaid in accordance with the terms of the loans it had received from the BNZ. Further, that the BNZ was becoming increasingly concerned about the level of escalating debt and wanted it repaid. Mr Hanson's evidence shows that by late December 2006, when the BNZ realised the debt would not be repaid that year it sought to protect its position by getting further security to support the debt. This included increasing the guarantee given by AHR, which was supported by a registered mortgage in favour of the BNZ over Mahutai Park. Therefore, it seems to me that by 18 December 2006 when the last guarantee was given Mr Ferreira was in a position where he had little, if any, choice as to whether Mahutai Park was sold or not, and whether he gave a further guarantee or not. As to the latter, I find his evidence that he did not realise he was signing a further guarantee to be implausible.

[132] I am not satisfied, therefore, that the last guarantee of $1,820,000 was given as a result of representations that were made by Ms Stockinger. I have the impression that if that guarantee had not been given the BNZ would have taken steps to realise what securities and guarantees it already held, so that the last guarantee was simply a means of forestalling such steps from being taken. I consider that the more reliable evidence of events during this time is to be found in the affidavit of Mr Hanson and that Mr Ferreira's account of why AHR sold Mahutai Park when it

did and why the sale proceeds were applied in the way that they were is not plausible.

[133] When the AHR guarantee was first given to the BNZ in August 2005 (of a sum up to $1,000,000) the circumstances at that time may support the view that the guarantee was given in reliance on Ms Stockinger's promise to cover losses that were incurred. However, the concern that I have here is how this can support Mr Ferreira bringing an action in equitable estoppel.

[134] First, the party who was liable under the guarantee was AHR not Mr Ferreira. AHR is not a plaintiff in the proceeding. Mr Ferreira suffered no direct personal loss as a result of AHR providing the guarantee. To treat Mr Ferreira as suffering loss necessitates ignoring the separate legal identities of Mr Ferreira and AHR. He provided no legal argument in support of such an approach, which entails a departure from well settled law.

[135] Secondly, insofar as any promise Ms Stockinger made to reimburse the guarantor (ie AHR) for any loss it might suffer as a result of guaranteeing AHQ's debts to the BNZ is enforceable that would be through a contract of indemnity, and not through equitable estoppel.

[136] As to the first reason why I think the present action in equitable estoppel must fail, I consider that in the absence of legal argument to the contrary, of which there was none, it is important to maintain recognition of the separate legal identities of the natural and corporate persons who engaged in the actions that are now the subject of these proceedings.

[137] Mr Ferreira provided no authority for why the parties' disregard of AHR and AHQ's separate legal personalities was itself a justification for piercing the corporate veil. Instead he advanced arguments for piercing the corporate veil that were based simply on the fact that this was how they had conducted themselves in relation to the companies.

[138] Mr Ferreira submits that it would be appropriate to treat transactions between the parties and their companies as being made by them personally because:

(a) Ms Stockinger treated the parties' assets as personal assets and their payments as personal payments in all their correspondence. For example, in her emails she stated "I guaranteed" where she had to be talking about her company;

(b) The entire time that they were in New Zealand, Ms Stockinger used a company credit card for all personal and business expenses;

(c) Ms Stockinger used AHQ as an extension of herself so that the company was no more than a sham.

(d) On 23 January 2007 she stated that there was a buyer for her German horse stud and "after everything goes smoothly we could also 'divide between us' and maybe everything will get sorted out again after some time"; he categorised these and her other assurances of financial matters being "sorted out" as being personal assurances that he would be compensated personally for the financial assistance AHR was providing through its guarantee to the BNZ of AHQ's indebtedness.

(e) Ms Stockinger sought to rely on the doctrine of equitable estoppel when AHR brought civil proceedings against AHQ, claiming that the parties' finances and their companies' finances were complicated, interconnected and intertwined and it would not be fair to look at the companies' payments in isolation; here he asserted that those claims were the reason AHR's summary judgment application was dismissed.

(f) The advances made by Mr Ferreira or his company to Ms Stockinger or AHQ became his loses once AHR ceased to have any value and was put into liquidation. Mr Ferreira claims that this was as a result of Ms Stockinger's unconscionable conduct in January 2007 where she ensured that his bank accounts would be frozen, sent his business

documents to German Tax Authorities, and failed to guarantee his accounts with BNZ.

[139] In *Attorney-General v Equiticorp Industries Ltd (in stat man)* the Court of Appeal said:[42]

> The phrase "to lift the corporate veil" is a description of the process by which in certain situations the Courts can look behind the corporate facade and identify the real nature of a transaction and the reality of the relationships created. It is not a principle. It describes the process, but provides no guidance as to when it can be used.

[140] And in *Chen v Butterfield* Tipping J summarised the situation as:[43]

> In essence the corporate veil should be lifted only if in the particular context and circumstances its presence would create a substantial injustice which the Court simply cannot countenance. Whether that is so must be judged against the fact that corporate structures and the concept of separate corporate identity are legitimate facets of commerce. They are firmly and deeply engrained in our commercial life. If they are genuinely and honestly used they should not be set aside. In any event something really compelling must be shown to go behind them.

[141] Courts have also been prepared to lift the corporate veil where "special circumstances exist indicating that it is a mere façade concealing the true facts."[44]

[142] In the present case, there is no doubt that AHQ and AHR were incorporated on the advice of New Zealand lawyers, Hesketh Henry, to carry on actual legitimate business ventures for the parties. In this way Mr Ferreira and Ms Stockinger sought to satisfy New Zealand immigration requirements and requirements of the Overseas Investment Commission (OIC).

[143] In accordance with the advice from Hesketh Henry two New Zealand registered companies were incorporated with Mr Ferreira owning the shares in one and Ms Stockinger the shares in the other. The idea was to present both persons being investors in New Zealand. A letter written in May 2005 by Hesketh Henry about the transactions they were involved in for AHR and AHQ states:

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42 *Attorney-General v Equiticorp Industries Group Ltd (in stat man)* [1996] 1 NZLR 528 (CA) at 541.

43 *Chen v Butterfield* (1996) 7 NZCLC 261,086 (HC) at 261,092.

44 See for example *Official Assignee v 15 Insoll Avenue Ltd* [2001] 2 NZLR 492 (HC).

> … when we were first instructed regarding the purchase of the Gisborne and Orere Point properties, we made it clear to Peter and Daniela that, in order to purchase each property, they would need to obtain consent of the Overseas Investment Commission ("OIC") and that it would be very difficult to obtain such consent if a joint purchase of both properties was in being contemplated. It was in fact out understating that (a) the Gisborne property was to be purchased and operated by Peter, and the Orere Point property by Daniela, and Peter and Daniela intended to work cooperatively by marketing the complementary facilities afforded by each property to their clients.
>
> …
>
> Our clear instructions were that Agape-Holistic Retreat Corporation Ltd was owned and funded by Peter, and Agape-High Q-Holistic Horsemanship Corporation Ltd was owned and funded by Daniela but we accept that the adoption of separate companies rather than a jointly owned company vehicle as the means of purchasing the properties probably reflected our earlier advice as to the difficulties of achieving OIC consent if a joint application was made.

This letter was written in response to a letter from a German lawyer who wanted to know if Mahutai Park would be held on trust for Ms Stockinger since she was the person who provided the funds to buy the property.

[144] Later when Mahutai Park was to be sold Mr Ferreira's evidence reveals that he was keen either to obtain an interest in AHQ or to invest through a security in the Orere Point property to maintain his investments in New Zealand as support for his application for New Zealand residence.

[145] Thus, I am satisfied that AHR and AHQ were incorporated for genuine investment purposes in New Zealand. The evidence suggests that both Mr Ferreira and Ms Stockinger squandered the financial resources of AHR and AHQ, but this cannot extinguish the genuine commercial reasons for their incorporation; they were legitimate business structures and not just sham companies.

[146] The fact Mr Ferreira and Ms Stockinger treated each company's funds as if they were their own personal funds cannot justify piercing the corporate veil. Their failure to recognise their respective obligations as directors of each company as well as the companies' separate legal personalities cannot now be used to the advantage of Mr Ferreira, or Ms Stockinger for that matter.

[147] Nor do I accept that the way in which AHQ opposed the summary judgment application can now justify piercing the corporate veil in this proceeding. The summary judgment application failed because the Associate Judge believed there was a defence. He may have been led astray by misleading submissions from AHQ in this regard, however the appropriate response to that would have been for AHR to pursue the claim as an ordinary proceeding. There was nothing at the time stopping AHR from pursuing an ordinary proceeding against AHQ, with the addition of the present parties and the appropriate causes of action so that there was a comprehensive set of claims before the court.[45] In this way inconsistent defences and inconsistent outcomes would have been avoided. Instead after summary judgment was refused AHR appears to have abandoned its claims against AHQ, and Mr Ferreira commenced the Property (Relationships) Act proceedings in the Family Court, which he has since in substance abandoned in favour of the present civil proceedings.

[148] Finally, the fact that AHR is now a struck off company which can no longer bring indemnity proceedings against AHQ or Ms Stockinger (depending upon whether her requests and promises are viewed as being made on behalf of AHQ or on her own behalf) is no reason for permitting Mr Ferreira to bring proceedings against her personally.

[149] In short, Mr Ferreira's arguments for lifting the corporate veil do not withstand scrutiny.

[150] As to the second reason why I think Mr Ferreira cannot maintain an action in equitable estoppel, in principle a contract of indemnity is a contract by which the promisor undertakes an original and independent obligation to keep another party

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[45] Mr Ferreira maintains that AHR lacked funds to maintain its proceeding against AHQ. However impecuniosity cannot be used to justify a failure to pursue appropriate proceedings and to explain a later resort to inappropriate proceedings. I note that after the dismissal of the summary judgment application Mr Ferreira commenced his own proceedings in the Family Court against Ms Stockinger. The funding used for those proceedings could have been applied to proceedings in this Court that involved AHR, AHQ, Mr Ferreira and Ms Stockinger.

harmless against loss.[46] Such contracts can be express or implied from the circumstances:[47]

> Where one person at the request of another does an act, which is not in itself manifestly tortious to the knowledge of the person doing it and which he was not otherwise under any obligation to do, and thereby involves himself in liability, a right of indemnity will generally arise.

[151] If Ms Stockinger requested Mr Ferreira as a director of AHR to cause AHR to guarantee AHQ's debt to the BNZ, and if she promised to reimburse AHR for any harm it suffered as a result of the guarantee that is an actionable indemnity. If she promised to reimburse Mr Ferreira for any loss that he suffered as a result of him causing AHR to guarantee AHQ's debts at her request that may also amount to her offering him an indemnity.

[152] The one caveat to whether the law of indemnity would permit a recovery for losses suffered as a result of the guarantee from AHR would be if by causing the guarantee to be given Mr Ferreira was breaching the fiduciary duty he owed to AHR as its director.

[153] As a director of AHR he was under a fiduciary obligation to act in the interests of that company rather than to advance his personal interests. A breach of the fiduciary duty that he owed to AHR might preclude him recovering on the indemnity. The ex turpi causa principle precludes a plaintiff from bringing a claim that is founded on an illegal or immoral act. Lord Mansfield in *Holman v Johnson* said:[48]

> No Court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If … the cause of action appears to rise *ex turpi causa* … there the Court says that he has no right to be assisted. It is upon that ground that the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

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46 See *Halsbury's Laws of England* (5th ed, 2015) vol 49 Financial Instruments and Transactions at [880].

47 IH Jacob *Bullen & Leake and Jacob's Precedents of Pleadings* (12th ed, Sweet and Maxwell, London, 1975) at 496–497 citing *Toplis v Grane* (1839) 5 Bing NC 636 at 651; followed in *Dugdale v Lovering* (1875) LR 10CP 196.

48 *Holman v Johnson* [1775] 1 Cowp 341 at 343.

[154] A more recent statement of the operation of the principle is to be found in *Hall v Hebert* by McLachlin J:[49]

> The basis of this power … lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left.

[155] If by incurring liability for AHR under the guarantee of AHQ's debt to the BNZ Mr Ferreira was breaching fiduciary duties that he owed to AHR as a company director, the ex turpi causa principle would prevent him from making any claim for compensation of the harm he suffered as a result of giving the guarantee.

[156] Despite this being a formal proof where the Court generally takes no notice of potential affirmative defences, the ex turpi causa principle is more than this. Once the Court becomes aware that a plaintiff's claim is reliant upon conduct on his part which comes within the ex turpi causa principle it is the duty of the Court to take note of it and to determine what effect it may have on the outcome of the claim.[50]

> In principle, once an illegality arises on the facts, it is the duty of the Court to inquire into the illegality: see *Duncan v McDonald* [1997] 3 NZLR 669 (CA); and *Snell v Unity Finance Co Ltd* [1964] 2 QB 203 (CA). In *Duncan v McDonald* at 677, the Court of Appeal said:
>
> > While it may have suited Mr Duncan not to accuse the McDonalds of dishonesty, that question was in reality always a live issue. Furthermore, it is the duty of a Judge to take note of illegal conduct even if it is not pleaded. The Courts may decline to assist a plaintiff who has been guilty of illegal or immoral conduct of which the Court should take notice: *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at p 35. When Anderson J concluded that the McDonalds had been dishonest participants in illegality it was proper for him to make such a finding even if the issue had not been directly raised by the pleadings or in argument.
> >
> > It was suggested by Mr Thorp that the Judge should not have made his finding without first warning the McDonalds and giving them the opportunity of responding from the witness box and calling further evidence on the question. Mr Harrison QC accurately submits, however, that the question was so obviously before the Court that the McDonalds must have been aware of the need to establish their

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49 *Hall v Hebert* [1993] 2 SCR 159 at 169.

50 *Shoye Venture Ltd v Wilson* [2013] NZHC 658 at [178].

> honesty. There was no call in the particular circumstances for any such warning from the Judge.

[157] In short, I am satisfied that if Mr Ferreira has any basis for bringing a claim in his own right against Ms Stockinger in relation to the guarantees that AHR gave to the BNZ bank it lies in the law of indemnity.

[158] I see no reason, therefore, to stretch the law of equitable estoppel to apply to circumstances that are already actionable under a well settled cause of action.

[159] It follows that Mr Ferreira cannot establish his claim in equitable estoppel for equitable damages to compensate him for payments that AHR was obliged to make to the BNZ in respect of the guarantees of AHQ's debts.

[160] The remainder of Mr Ferreira's claims in equitable estoppel are based on advances that either he or AHR made at the request of Ms Stockinger with the payment going to: Ms Stockinger; AHQ; or creditors of either Ms Stockinger or AHQ.

[161] Regarding advances that were made directly to either Ms Stockinger or AHQ by Mr Ferreira, these seem to me to be no more than claims for money lent. *Bullen & Leake and Jacob's Precedents of Pleadings* refers to the cause of action of money lent. It describes the cause of action in this way:[51]

> A loan may be recovered as a simple contract debt …
>
> If there is no stipulation as to the time of payment, the liability to repay the loan arises at once without the need for making any request or demand, "the debt which constitutes the cause of action arises instantly on the loan" (*Norton v Ellam* (1837) 2 M. & W 461, per Parke B. at 464; and see *Re George, Frances v Bruce* (1890) 44 Ch D 627). But the parties may, of course, agree upon the time for repayment or that the loan should only be repayable on demand; …

[162] The precedent given for recovering a loan on a simple contract is as follows:

> The plaintiff's claim is for [$]--, being money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant.

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[51] Jacob, above n 47, at 675.

Particulars

19 --, -- --. amount lent this day, [$].

[163] As regards advances that were paid to a third party, when a plaintiff has paid money at the request of a defendant to a third party the cause of action of money paid at the defendant's request is the mechanism for the plaintiff to obtain recovery of the funds so advanced. *Bullen & Leake and Jacobs Precedents of Pleadings* describe the cause of action of money paid in the following way:[52]

> A claim on an implied promise is appropriate where there has been a payment of money by the plaintiff to a third party at the request or by the authority of the defendant, express or implied, with an undertaking, expressed or implied to repay it. There must be actual payment, or what is equivalent to it, by the plaintiff of money which he is entitled to be repaid by the defendant.

[164] The authors of *Bullen & Leake and Jacobs Precedents of Pleadings* say further:[53]

> This form of action may also be employed whenever there is an express or implied request to make a payment, and the person making such request has expressly or impliedly agreed to indemnify the payer (*Moule v Garrett* (1872) LR 5 Ex 1320 …)

[165] The authors further note that:[54]

> If the payment of money by the plaintiff to the defendant is admitted, there is an implied obligation to repay the money in the absence of any circumstances to show why it is not repayable, e.g. that it was intended as a gift (*Seldon v Davidson* [1968] 1 WLR 1083).

[166] Whilst a voluntary payment will not suffice, the request or authority by the defendant for the payment to be made may be implied from:[55]

> … the general course of dealing, or from the nature of the particular transaction.

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52 At 678.
53 At 678.
54 At 678.
55 At 678.

Further:

> A request may sometimes be implied where the defendant has notice of the payment being made for him and does not dissent (*Paynter v Williams* (1883) 1 C & M 810; *Alexander v Vane* (1836) 1 M & W 511).

[167] The precedent form for such a claim as provided in *Bullen & Leake and Jacob's* is as follows:[56]

> On or about the —— day of ——, 19 ——, the plaintiff paid to one *A B* the sum of [$]—— for and on behalf of the defendant and at his request.
>
> Particulars
>
> The said request was made by the defendant orally at ——, on the said date [*or* was made by, *or* is contained in, a letter signed by the defendant dated the —— day of ——, 19 ——.]
>
> [*or*, The said request is be implied from the following circumstances namely, *state the circumstances*.]
>
> 2. In the premises, the defendant became and is liable to repay the said sum to the plaintiff.
>
> And the plaintiff claims the said sum of [$]——.

[168] In my view the long and well settled presence of causes of action for money lent, or money paid at a defendant's request were the appropriate vehicle for Mr Ferreira to bring claims for the recovery of the advances he alleges he made either directly or indirectly through AHR at Ms Stockinger's request. The availability of those causes of action satisfy me that there is no need for me to stretch the principles of equitable estoppel and equitable damages to the present circumstances.

[169] I am satisfied, therefore, that on the merits the balance of the claims Mr Ferreira makes for equitable estoppel fail.

[170] In addition, in respect of some of the alleged advances, Mr Ferreira faces the difficulty I have previously discussed that the advances did not take place in New Zealand. Some of the advances, for example the monies he says he advanced at Ms Stockinger's request to the Cook Islands company that owned the yacht Agape,

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[56] At 679.

and other expenditure for this yacht are advances that did not occur in this country. Those advances may not be recoverable in New Zealand. They were made at a time when Agape, which was owned by a Cook Islands registered company, was lying at Fiji. Further, at the time the advances were made Mr Ferreira had 50 per cent of the shares in Agape. To the extent the advances went to improve Agape at the time there was indirect benefit to him. Agape was later transferred to Ms Stockinger. Nothing was done at the time of the transfer to reimburse Mr Ferreira for the advances.

[171] Thus the advances made outside of New Zealand to an entity outside of New Zealand may fall outside the jurisdiction of this Court and for that reason also they are not recoverable.

[172] Before the passage of the Property (Relationships) Act the division of property when de facto relationships ended was subject to the common law and equity principles set out in cases such as *Lankow v Rose* and *Gormack v Scott*.[57] Accordingly, I have given consideration to whether those cases may have been of assistance to Mr Ferreira. However, from what I have read those cases are focused on how the assets acquired during the de facto relationship are to be divided. They do not consider how matters should be dealt with when one of the former partners to the de facto relationship asserts that the other partner is under an obligation to pay him for advances received during the relationship.

[173] Outside the Property (Relationships) Act advances between couples will either amount to a loan, a gift by virtue of the presumption of advancement[58] or give rise to either a resulting or a constructive trust upon which assets acquired by the advance are held.[59] Because this matter has proceeded as a formal proof there is no issue regarding the application of the presumption of advancement.[60] Because here the advances have resulted in losses rather than the acquisition of assets, there is no question of a claim based on resulting or constructive trust. Nor has Mr Ferreira

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57 *Hildred v Strong* [2007] NZCA 475, [2008] 2 NZLR 629 at [4] citing *Lankow v Rose* [1995] 1 NZLR 277 (CA); and *Gormack v Scott* (1995) 13 FRNZ 43 (CA).

58 See *Pettitt v Pettitt* [1970] AC 777 (HL) at 793, the presumption of advancement implies that the maker of the advance intended it to be a gift to the recipient.

59 At 814 and 815.

60 There is no argument that the advances were made as a gift to Ms Stockinger.

argued for such. All that is left to him, therefore, are claims to recover the advances as loans based on the well settled causes of action of money lent and money paid.

Claim based upon unconscionable conduct

[174] Unconscionable conduct lies at the heart of equity. It is an essential element in many, if not all, equitable causes of action. However, it is not a cause of action in itself.

[175] In the present case the second cause of action alleging unconscionable conduct relies on the circumstances to support the first cause of action in equitable estoppel. The additional allegations made under this cause of action are that during the material times Ms Stockinger remained silent and did not inform Mr Ferreira that she would be seeking to set-off against claims he makes for repayment, her own claims for payment or claims of ownership in relation to advances she made to him or for assets, the acquisition of which she had funded, but which were recorded in his name or AHR's name. Those type of arguments would be relevant to an argument that Mr Ferreira might raise to counter a defence of equitable set-off raised by Ms Stockinger. However, this is a formal proof and nothing of that nature is in issue here.

[176] As matters stand, I consider there is no foundation to the second cause of action. I am reinforced in this view by the remedies that Mr Ferreira seeks for the second cause of action. First, he seeks equitable damages in respect of losses that are the same losses that he seeks recovery of for the first cause of action. In this regard the second cause of action can only be a duplication of the first. He cannot claim for the same losses twice. Secondly, he seeks equitable damages in respect of his legal expenses incurred in resolving disputes with Ms Stockinger concerning his chattels, his horse Esstashan, and legal expenses in relation to the AHR – AHQ civil proceedings. I know of no principle that would permit him to recover legal expenses incurred in separate proceedings as a form of equitable damages to be awarded in the present proceedings. Nor did Mr Ferreira refer me to any such principle. Further, this aspect of the prayer for relief for equitable damages under the second cause of action is unrelated to the allegations pleaded in the second cause of action.

[177] Finally, Mr Ferreira seeks a declaration that funds held by BDO Spicers as stakeholder for himself and Ms Stockinger, being $63,040 together with any accrued interest are his property. He has not in the allegations pleaded in the second cause of action made it clear how he can seek recovery of those funds by way of a claim based on unconscionable conduct.

[178] In short, Mr Ferreira has failed to make out any foundation whatsoever for the recovery of the equitable damages that he seeks under the second cause of action.

Conversion claims

[179] Apart from specific references to Esstashan, the German tax documents and reformatting of the computer drive, the amended statement of claim does not identify the chattels that are the subject of the conversion claim.[61] Further the damages that are claimed for conversion relate only to the alleged $300,000 worth of chattels and the $24,819.03 stabling costs paid for Esstashan.

[180] The removal of Mr Ferreira's tax information may amount to conversion, but no damages are specifically claimed for this conduct.

[181] The $24,819.03 stabling costs claimed were incurred by Mr Ferreira while the horse was stabled pending payment of the $63,400 to BDO Spicers. Ms Stockinger had asserted a lien over the horse until this amount was paid.

[182] In the statement of claim, it is alleged that:

> … the plaintiff was required to pay $63,400 to BDO Spicers, accountants, to be held by them as an independent stakeholder pending the resolution of their dispute, and was forced to incur stabling costs of $24,819.03, before the first defendant would agree to release the horse.

[183] And further:

> She refused to return the plaintiff's horse, Esstashan to him between 16 March 2007 and October 2007, initially claiming ownership, and then refusing to release the horse without payment being made to BDO Spicers as

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[61] The converted chattels should be described in the statement of claim with sufficient certainty to inform the defendant what goods she is charged with converting.

> a stakeholder, and causing the plaintiff to incur $24,819.03 in stabling expenses as pleaded [above].

[184] In fact letters in evidence from the parties' lawyers show that the parties reached an agreement about how the disputed lien claim was to be handled. As I have outlined above the agreement originally was that Mr Ferreira would pay $63,400 immediately and be able to remove the horse directly from Orere Point. Later the arrangement was varied so that Esstashan was moved to the stables of a third party who held him as Ms Stockinger's agent but with Mr Ferreira being liable for the stabling costs.

[185] An email from sent on 25 July 2007 from Ms Stockinger's lawyers sets out the conditions of the stabling:

> Please would you also confirm that you understand that, in addition to Mr Ferreira bearing all liability for any and all costs which may be incurred for the collection, transportation and keeping of Esstashan:
>
> 1. You are holding Esstashan as agent for Daniela Stockinger (and not Mr Ferreira) and that you will return Esstashan to Ms Stockinger immediately if requested to do so;
>
> 2. Mr Ferreira is solely responsible for the insurance of Esstashan and by copy of this email, Mr Ferreira, through his solicitors is on notice that suitable insurance arrangements must be made by him;
>
> Please note that all of Ms Stockinger's rights with respect to Esstashan are expressly reserved.

[186] It appears from receipts provided in evidence that the horse was stabled with the third party between July 2007 and November 2008.

[187] Mr Ferreira has not pointed to evidence showing how the agreement was reached. However, from a letter sent by his lawyers on 5 June 2007, it appears that the stabling was his idea:

> Peter proposes that Daniela places Esstashan in the custody of David Cole of IRT, on the basis that he will hold Essashan for Daniela (at Peter's cost), until Daniela agrees to release him, or David Cole is supplied with a copy of a letter from BDO Spicers confirming that payment has been received, and the horse can be released.

[188] Later correspondence sent from his lawyer shows that he at least agreed to this arrangement. A letter of 10 September 2008 describes the arrangement:

> … Subsequently, the agreement was varied to cover a slightly larger payment, and the fact that the horse would be held by Landseer Stud at Mr Ferreira's cost, but the agreement otherwise remained unchanged.

[189] And a further letter of 22 September 2008 states:

> Our client has acted in reliance on the agreement, to his detriment, and in doing so has performed his part of the bargain.
>
> Your client is contractually obliged to release the horse. Refusal to release the horse will be taken as repudiation of the agreement.

[190] Whilst Mr Ferreira reserved his rights as to whether he was liable to pay the $63,400 claimed as a lien, there is no evidence to suggest that he disputed his responsibility for paying the stabling costs while Esstashan was held by the third party.

[191] The essential features of conversion are:[62]

> (a) The defendant's conduct was inconsistent with the rights of the owner or another person entitled to possession;
>
> (b) The conduct was deliberate; and
>
> (c) The conduct was so extensive an encroachment on the owner's rights as to exclude him from use and possession of the goods.

[192] Conversion may be committed by wrongful retention of goods:[63]

> Conversion may also arise in other ways, as where a defendant who innocently obtains possession of a chattel is shown to have an intention to retain it as against a plaintiff who has the immediate right to possession. In such a case a demand by the plaintiff and a failure to comply with the demand by a defendant is the usual, but not the only, means of establishing the defendant's intent and the plaintiff may sue in detinue for the return of the specific chattel or in conversion for damages.

[193] The plaintiff must first show that they have an immediate right to possession of the goods in question. An immediate right to possession does not follow simply

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62 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (HL) at [39] and [42].

63 *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 (CA) at 346. See also *Parry v Fassler* HC Wanganui CIV-2011-483-97, 4 November 2011 at [20]–[24]; and *Fassler v Parry* [2012] NZCA 327 at [7].

because the plaintiff is the owner of the goods as "the tort of conversion depends upon the right to possession, not on title".[64]

[194] The existence of a valid common law possessory lien over goods is an answer to a claim of conversion.[65] A common law lien is the right of one person to retain possession of the goods of another until that person's claims are satisfied. It depends upon possession of the goods and lasts as long as possession is retained.[66] Accordingly, where there is a valid lien held over goods, as against the person holding the lien, the owner of the goods does not have the right to immediate possession because the right to possess those goods lies with the lien holder.

[195] Here, Ms Stockinger claimed a lien over the horse, pending payment of the claimed debt of $63,400. The stabling costs were incurred between the time the lien was claimed and Mr Ferreira's payment of this money. Throughout this time Ms Stockinger asserted her control over and did not relinquish possession of the horse.

[196] Ms Stockinger may not have a valid claim for a lien over the horse. However, the right to immediate possession is an essential element of the cause of action of conversion and Mr Ferreira was required to show whether he had the right to immediate possession. Accordingly, I consider that by not addressing the validity of the claimed lien, Mr Ferreira has failed to do this.

[197] In addition, Mr Ferreira faces the difficulty that he agreed to the arrangement under which he was liable for the stabling fees. I consider that the effect of the arrangement was that Mr Ferreira forfeited any right to possess the horse until he had paid the $63,400 to BPO Spicers.[67]

[198] Mr Ferreira faces a further hurdle concerning the damages claimed. Damages available in conversion are to compensate for loss suffered. The usual

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64 *Parry v Fassler*, above n 63, at [26].

65 See for example *United Plastics Ltd (in liq) v Reliance Electric (NZ) Ltd* [1977] 2 NZLR 125 (SC).

66 *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd* [1974] 1 NZLR 484 (CA) at 490.

67 In *Parry v Fassler*, above n 63, a contract for the plaintiff's beehives to be kept on the defendant's land was held to result in the plaintiff not having the right to immediate possession of the beehives at [31].

measure of damages is the market value of the goods, as this generally represents the loss suffered by the plaintiff.[68] However here, as Mr Ferreira recovered ownership of Esstashan, the loss claimed is the consequential loss for the stabling costs. To recover damages for consequential loss the plaintiff must show the necessary causation; the wrongful conduct must have been a substantial or proximate cause of loss and questions of mitigation and remoteness may be relevant:[69]

> This guideline principle is concerned to identify and exclude losses lacking a causal connection with the wrongful conduct. Expressed in its simplest form, the principle poses the question whether the plaintiff would have suffered the loss without ("but for") the defendant's wrongdoing. If he would not, the wrongful conduct was *a* cause of the loss. If the loss would have arisen even without the defendant's wrong doing, normally it does not give rise to legal liability …

[199] Although it is not mentioned in the amended statement of claim, it is clear that Mr Ferreira considers he can recover the stabling costs because he would not otherwise have incurred them as he would have been free to sell the horse.[70] He states in his affidavit that he had a buyer interested in Esstashan in early 2007 for 250,000 Swiss Francs. However, this is not mentioned in the letters between the parties in 2007 provided in evidence. Mr Ferreira has not pointed to any other evidence to support the claim that a buyer was interested, or, if he was, the timeframe in which a sale would have been completed. In the event that Mr Ferreira did not have a buyer available immediately, he would have had to pay to stable Esstashan himself.

[200] Accordingly, Mr Ferreira has not satisfied me that he would not otherwise have incurred the stabling costs and that the costs can be attributed to Ms Stockinger's conduct. For this reason, even if Mr Ferreira had established a right to possess the horse, the damages claimed for the stabling amount must fail.

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[68] See Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [12.3.04]

[69] *Kuwait Airways Corp*, above n 62, at [72] as cited in *Glenmorgan Farm Ltd (in rec and in liq) v New Zealand Bloodstock Leasing Ltd* [2011] NZCA 672, [2012] 1 NZLR 555 at [76].

[70] Absent the prospect of an early sale of Esstashan, Mr Ferreira would have been obliged to incur stabling costs for the horse as the horse needed to be maintained. Further, it was Mr Ferreira who suggested Esstashan be stabled with David Cole of IRT so he can hardly complain that those costs were too expensive.

[201] As regards the allegation that Ms Stockinger took a blank sheet of paper with Mr Ferreira's signature on it and used this to fabricate evidence it is difficult to see how what is essentially a fraud allegation can amount to the tort of conversion. The losses that are alleged to have flowed from that action have no direct connection with any estimated market value that could be placed upon the blank sheet of paper bearing Mr Ferreira's signature.[71]

[202] As regards the claim for conversion of chattels of $300,000 in value, the general requirements for pleading a claim for conversion are that:[72]

> The goods should be described in the statement of claim with sufficient certainty to inform the defendant what goods he is charged with having taken; but it is not necessary to specify the goods item by item provided they are *particularised by description*, value and the dates between which it is alleged that they were converted.
>
> (Emphasis added).

Thus more is required than the bare allegation that chattels to the value of $300,000 have been converted.

[203] The general rule for assessing the value of converted chattels for the purpose of an award of damages is to take their market value at the time of the conversion.[73] If the market value has increased since the conversion there are occasions when the increased value may be recovered as damages.[74] When the market value has decreased since the time of conversion the recoverable damages may still be assessed at the market value when converted.[75] It is, therefore, essential to identify the chattels alleged to have been converted not only for the purpose of good pleading but also in order for a value to be placed on them to enable an award of damages to be made.

[204] In the present case Mr Ferreira has pleaded that $300,000 worth of chattels were converted without identifying them or attributing a market value to them. His

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71 See discussion at [198] and [199].
72 Jacob, above n 47, at 356 citing *Brightside Co-operative Society v Phillips* [1964] 1 WLR 185.
73 Harvey McGregor *McGregor on Damages* (19th ed, Sweet and Maxwell, London, 2014) at [36-006].
74 At [36-014]–[36-021].
75 At [36-014]–[36.021].

affidavits non-exhaustively list numerous chattels that he says were converted, and he deposes as to the price that he paid to acquire some of those chattels. It appears to me, therefore, that the value he places on those chattels is taken from the prices he paid to acquire them, which pays no regard to their actual market value at the time of the alleged conversion. Apart from his own evidence there is no evidence of attempts to place a market value on the chattels.

[205] The claim based on conversion is badly pleaded. It fails to provide a proper basis for the proof of this tort. Further such omission cannot be made good by reference to the evidence.

[206] In 1998 the Court of Appeal in *Price Waterhouse v Fortex Group Ltd*,[76] described pleadings as an "essential road map for the Court and for the parties." In saying this, the Court of Appeal rejected the idea that the exchange of briefs of evidence before trial could cure any lack of particularity in the pleadings:

> It has become fashionable in some quarters to regard the pleadings as being of little importance. There was an echo of that approach in the implicit suggestion floated in this case that exchange of briefs of evidence before trial might be seen as curing any lack of particularity in the pleadings. Any such view is misguided. Pleadings which are properly drawn and particularised are, in a case of any complexity, if not in all cases, an essential road map for the Court and the parties. They are the documents against which the briefs of evidence are or should be prepared. They are the documents which establish parameters of the case, not the briefs of evidence.
>
> We are not casting aspersions on the pleadings in this case which, leaving aside issues about necessary particularity, are well drawn on each side. Nor are we advocating a pedantic approach to the topic. Pleadings should be read as conveying what they would reasonably convey, in the context of the case, to a sensible legal mind. Even less are we advocating prolixity of pleadings, or the raising of every conceivable cause of action irrespective of its potential for success; this type of pleading often contains the additional flaw of overlooking R114 which requires each cause of action to be separately pleaded. What we are saying is that both the Court and opposite parties are entitled to be advised of the essential basis of a claim or defence, and all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against recognisable boundaries. Neither the Court nor opposite parties should be placed in the position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings.

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[76] *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 17–18.

[207] Pleadings have a different role from evidence which is one of the reasons why evidence cannot serve as a replacement for a properly pleaded statement of claim or defence. Pleadings discharge the requirement for fair notice of an opposing party's case by operating to define and to delimit the real matters in controversy between the parties.[77] A statement of claim should achieve these purposes:

a) Inform the defendant of the case she has to meet by pleading all material facts on which the plaintiff relies to establish a legally complete cause of action;

b) Enable the defendant to know the evidence she needs to prepare;

c) Focus on the real issues of the case; and

d) Tie the parties to the case they have set out in advance of the trial.

[208] Evidence on the other hand is how the plaintiff proves the material facts relied upon in the pleading. So, strictly speaking if a party's evidence goes further than what has been pleaded that evidence will be irrelevant. It is hard to see, therefore, how a plaintiff who has failed to provide a properly particularised statement of claim can expect to remedy this by reliance on the necessary information being found in his evidence.

[209] The general rule is that when there is a difference between a statement of claim and the briefs of evidence of the plaintiff, with the latter going further than what is stated in the pleadings, it will be necessary to amend the pleadings to bring them into line with the evidence. In *Club Marina Apartments Ltd v McHugh* Lang J stated:[78]

> [13] It is axiomatic that the Court must decide a case in accordance with the pleadings. Counsel for Club Marina referred me to the following statement of principle from *Otaki Tyre Service Centre Ltd v Whittaker & Ors* HC WN CIV-2001-485-978 11 December 2007 where McGechan J said:
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> > [24] As a matter of established practice, cases must be decided as pleaded. A court cannot decide a case upon evidence or arguments falling outside pleadings. Where

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77 Jacobs, above n 47, at 3.

78 *Club Marina Apartments Ltd v McHugh* (2008) 9 NZCPR 662 (HC).

> there is a difference between pleadings and evidence, amendment of pleadings is required.

[210] Lang J was hearing the case as an appeal from the District Court. The Judge in the District Court had decided that the comments by the real estate agent were a breach of the Fair Trading Act 1986. Lang J rejected that finding on the ground:

> [26] … In deciding the case on the basis of the agent's statements, the Judge went beyond the pleadings and the basis upon which the case for Ms McHugh had been run at trial. In doing so, I consider that he fell into error.

[211] I am satisfied, therefore, that I cannot bolster what is an inadequately pleaded cause of action by drawing on Mr Ferreira's evidence to fill the voids in his pleading. It follows that the claim for $300,000 damages for conversion of chattels must fail.

Claim for orders under the Property (Relationships) Act

[212] The fourth cause of action in the first amended statement of claim is for a series of orders under the Property (Relationships) Act. Mr Ferreira accepts that he and Ms Stockinger were in a de facto relationship of short duration in terms of s 14A of the Act. Because they did not have children together, the only way in which the Act could be applied to their relationship was if he could establish that he had made substantial contributions to the de facto relationship.

[213] The fourth cause of action pleads a series of ways in which Mr Ferreira alleges that he made substantial contributions to the relationship. However, at the formal proof hearing Mr Ferreira elected to pursue his civil claims against Ms Stockinger. In his submissions to this Court he essentially abandoned seeking to recover under the Property (Relationships) Act the financial contributions he alleges that he had made. He relied instead on the remedies sought in the civil causes of action to reimburse him for those contributions. However, he still sought the orders in paragraphs (a) and (b) of his fourth cause of action. These are:

(a) an order declaring that the plaintiff and the first defendant were in a de facto relationship of short duration within the meaning of s 14A of the Property (Relationships) Act 1976; and

(b) an order granting leave to bring a proceeding against the first defendant under the Property (Relationships) Act 1976 in respect of a relationship of short duration under s 14A of the Property (Relationships) Act 1976.

[214] The reasons he gave for seeking those orders are that:

(a) This aspect of his claim was strenuously denied by Ms Stockinger in the Family Court proceedings and so caused him to incur substantial costs and delayed for over five years before the present proceedings were commenced;

(b) Ms Stockinger had previously claimed the parties had been in a de facto relationship in the High Court proceedings brought by AHR against AHQ and this claim was a significant factor in those proceedings not being successful;

(c) A substantial part of the solicitor/client costs sought by Mr Ferreira in this proceeding relates to attendances in the Family Court in relation to the proceedings brought under the Property (Relationships) Act 1976; and

(d) Mr Ferreira sought findings of fact on the issue for personal reasons as he "seeks vindication of the position he took in the Family Court proceedings." It is an issue he feels strongly about.

[215] The question to be determined under s 14A of the Property (Relationships) Act is not whether the parties were in a de facto relationship, but whether it is one that qualifies for a property division to be determined under that Act. For that to occur here, Mr Ferreira has to establish that he made substantial contributions to the relationship.

[216] Mr Ferreira argues that he advanced approximately $2,834,421.60 to Ms Stockinger or to AHQ. However, the whole thrust of his claim in this proceeding

is that the $2,834.421.60 was advanced to either Ms Stockinger or to AHQ with the belief and in reliance on promises from her to repay that money. When the advances that he made are viewed in this way, they cannot be seen as a substantial contribution to the relationship. Such a contribution is something that is spent without an expectation of repayment. If the relationship ends the party who has made the substantial contribution can then seek to be given some recognition through remedies available to him or her under the Act. But when advances have been made, which from the very outset were made with the expectation they would be repaid, such advances cannot qualify in my view as contributions to the relationship, particularly when their repayment is sought in civil proceedings rather than under the Property (Relationships) Act. Here Mr Ferreira has sought to obtain judgment on the strength of his civil claims; it is logically contradictory for him also to seek the type of orders that he seeks under the Property (Relationships) Act as well.

[217] There is the added problem that for him a substantial portion of the funds (at least $1,740,000) he claims as part of his contributions were in fact the funds that AHR lost by virtue of the guarantee it gave to the BNZ of AHQ's debt. This cannot be viewed as his contribution to the de facto relationship. I am satisfied, therefore, that there is no basis to warrant me making the orders Mr Ferreira seeks under the fourth cause of action.

Conclusion on claims against Ms Stockinger

[218] As matters have turned out, I have found Mr Ferreira's civil claims have failed. But that is because on the analysis I have taken of the causes of action pleaded I find that they are not sustainable. Had the claims been brought for indemnity or for loans advanced by him to Ms Stockinger depending upon whether the promises he relied upon were made (a) by her to him for money advanced to her (a loan); or (b) by her to him for money he caused to be advanced to AHQ (an indemnity) he may have been able to prove such claims. Though he would still have faced a problem establishing his standing to bring such claims regarding advances that were in fact made by AHR.

[219] It follows that all causes of action against Ms Stockinger are dismissed and judgment on those causes of action is entered for Ms Stockinger.

Claims against AHQ

[220] Mr Ferreira makes a claim in equitable estoppel against AHQ relying on the same conduct that he pleads in relation to Ms Stockinger. He seeks equitable damages in the sum of $1,740,000. This is the sum of money that was applied from the proceeds of the sale of Mahutai Park by the BNZ under the guarantee given by AHR of AHQ's indebtedness to the BNZ to repay that debt. The reasons that I have given for refusing to allow the claim for equitable estoppel in Mr Ferreira's first cause of action against Ms Stockinger are equally applicable here.

[221] AHQ would have been liable to reimburse AHR for the losses that it suffered as a result of AHR guaranteeing AHQ's debt. The fact that AHR failed to establish this liability in its summary judgment application against AHQ does not mean it would have failed in an ordinary proceeding. However, it was for AHR to bring this claim, not Mr Ferreira.

[222] Any promises that Ms Stockinger made on behalf of AHQ to reimburse Mr Ferreira for losses that he might suffer through AHR guaranteeing AHQ's debts would be recoverable as an indemnity. The same would also be the case if Ms Stockinger made the promises in her personal capacity.

[223] It follows that Mr Ferreira has no claim against AHQ based on equitable estoppel. Accordingly the first cause of action against AHQ is dismissed and judgment is entered for AHQ.

Second cause of action against AHQ

[224] Mr Ferreira did not seek judgment for the second cause of action against AHQ. Accordingly that cause of action is also dismissed and judgment is entered for AHQ.

Conclusion

[225] Mr Ferreira has failed to prove the causes of action in the first amended statement of claim. Accordingly they are dismissed and judgment is entered for Ms Stockinger.

[226] As I have found in Ms Stockinger's favour r 15.11 does not apply and this judgment may be sealed in the usual manner.